IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

McNAMARA HOLDINGS, L.C., an Iowa limited liability company, Plaintiff, vs. MAQUOKETA VALLEY RURAL ELECTRICAL COOPERATIVE, an Iowa corporation; and JEFF GEHL, individually and as an employee of Maquoketa Valley Rural Electrical Cooperative, Defendants.	No. C01-0132 **ORDER**

This matter comes before the court pursuant to a trial on the merits held April 20-21, 2004. The plaintiff was present and represented by Stephen Marso and Frank Grenard. The defendants were represented by Lawrence McLellan. The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) (docket number 39). The court finds in favor of the plaintiff as set forth below.

Nature of the Case

This is an action pursuant to two provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6972(a)(1)(A) and 6972(a)(1)(B), Iowa Code § 455B.111, and Iowa common law. The plaintiff claims that the defendants were responsible for an imminent and substantial endangerment to public health or the environment by causing the release of petroleum and by subsequently failing to properly report, investigate, or remediate the effects of the release, in violation of 42 U.S.C. § 6972(a)(1)(B). The plaintiff also claims that the defendants violated standards,

regulations, requirements and prohibitions when they caused the improper disposal of petroleum on the plaintiff's property and then failed to comply with applicable reporting, investigation, and remediation requirements, in violation of 42 U.S.C. § 6972(a)(1)(A).

The defendants assert that the filing of this lawsuit was premature and unnecessary and that at the time of the filing of this lawsuit, no imminent or substantial endangerment to health or the environment existed. The plaintiff next claims that it was adversely affected by the defendants' violation or failure to perform a duty or act in violation of Iowa Department of Natural Resources (IDNR) Chapter 567.133.3(4)(a), by failing to conduct the necessary preventative, investigatory and remedial actions. The defendants deny that they unreasonably failed to perform any such duties or acts. The plaintiff also alleges that the defendants' release of petroleum on the plaintiff's property constitutes a nuisance under Iowa common law. Finally, the plaintiff claims that the defendants have committed negligence under Iowa common law, because Defendant Gehl was negligent in losing control of Maquoketa Valley's vehicle and hitting the gasoline pump, and the defendants' negligence was the proximate cause of damages suffered by the plaintiff. Both the plaintiff and the defendants make claims for attorney's fees pursuant to 42 U.S.C. § 6972(e). The defendants contend that the plaintiff should not be awarded attorney's fees even if it is the prevailing party because it has repeatedly attempted to overreach throughout the course of this litigation.

Findings of Fact

The plaintiff owns real estate located in Anamosa, Iowa. A gas station, Petro Provisions (Petro), is located on the plaintiff's property. Petro maintains petroleum pumps on the plaintiff's property in connection with its business. On March 16, 2001, at approximately 8:30 a.m., Defendant Jeff Gehl (Defendant Gehl) was driving a Maquoketa Valley truck and pulled into Petro. Defendant Gehl was, at all times relevant to this case, employed by Defendant Maquoketa Valley Electric Cooperative (Maquoketa Valley) as a truck driver. Upon entering Petro, Defendant Gehl lost control of the vehicle due to snow

and collided with a petroleum pump. The collision knocked over one of the petroleum pumps and petroleum spilled onto the ground surface. The escaping gasoline sprayed approximately eight to ten feet in the air for a short period of time.

An employee quickly shut off the pumps using an emergency switch. Local fire department officials were called to the accident scene and they applied oil soak absorbents to the gasoline spill. The oil soak absorbents were placed around the petroleum pumps by members of the local fire department in a 20 to 30 square foot area thought to be the most saturated with gasoline. Four bags of oil absorbents were applied, which could absorb a total of approximately five gallons of gasoline, water, or any other liquid. A local contractor later gathered the oil absorbents and disposed of them. A check of pump records convincingly demonstrated that approximately 47 gallons of gasoline was lost from the spilled petroleum pump.

Defendant Maquoketa Valley reported the accident and spill to its insurance carrier on March 16, 2001. Midwest Liquid Systems checked the plaintiff's equipment on March 16, 2001, and found nothing other than the vehicle damage to be wrong or defective with any of the equipment. On March 19, 2001, the plaintiff reported the spill to the Iowa Department of Natural Resources (the IDNR). Defendant Maquoketa Valley's insurance carrier retained GAB Robins to investigate the loss associated with the accident and spill. On March 22, 2001, David Phelps of GAB Robins met with Dan McNamara, the plaintiff's owner, to inspect and review the loss. In a March 22, 2001 letter from the IDNR to the plaintiff, the IDNR ordered that a written report regarding the spill be submitted within thirty days (Plaintiff's Exhibit 3). The plaintiff provided a written report dated April 4, 2001 to the IDNR (Defendants' Exhibit A).

Also on April 4, 2001, Frank Grenard, attorney for the plaintiff, told David Phelps of GAB that an investigation of the spill site should be completed to determine if contamination was present as a result of the March 16, 2001 accident. GAB asked Mr. Grenard to recommend someone to perform preliminary testing of the spill site.

Mr. Grenard suggested that James Marek, the division manager for Apex Environmental Incorporation, could perform the preliminary testing. On April 6, 2001, Mr. Grenard spoke with Mr. Marek and requested a proposal concerning preliminary testing for any environmental issues relating to the spill. Also on April 6, 2001, Mr. Grenard sent a letter to Mr. Phelps, indicating that it was not known at that time what the environmental consultants might recommend, and that Mr. Grenard would let Mr. Phelps know the same as they proceeded (Defendants' Exhibit B). In his letter, Mr. Grenard stated that the plaintiff had suffered a business loss of $14,042.08. By the time of trial, plaintiff stipulated that his business loss was only $242.00.

In an April 10, 2001 letter from Mr. Marek to the plaintiff, Mr. Marek submitted a preliminary proposal for testing the soil on the plaintiff's property (Plaintiff's Exhibit 5). On April 11, 2001, Mr. Grenard forwarded Mr. Marek's April 10, 2001 letter to GAB (Plaintiff's Exhibit 6). On April 17, 2001, GAB authorized Apex's preliminary testing proposal and agreed to pay for the costs of Apex's work. Mr. Marek performed preliminary testing of the soil on the plaintiff's property on April 27, 2001.[1]

In conducting his preliminary testing, Mr. Marek used a photo ionization detector (PID) to screen several soil samples in order to determine the relative presence or absence of contamination at the site. During Mr. Marek's initial PID screening, he discovered that 13 of the 21 locations sampled were above 10 parts per million volume level. Ten parts per million is the level at which IDNR identifies soil as contaminated and calls for excavation of it. The greatest contamination level found by Mr. Marek during his initial PID screening was 2,000 parts per million, which is also the highest reading that a PID is capable of detecting. Based on the initial PID results, Mr. Marek determined which samples should be sent to a laboratory for further analysis.

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[1] The parties stipulate that in September of 1995, one soil sample and one water sample were taken from the plaintiff's property and the results did not reveal any contamination.

The laboratory tests of Mr. Marek's samples indicated that one sample (sample SB-4) exceeded the Tier I Iowa RBCA criteria (IDNR action level) of .54 parts per million for benzene concentration (Plaintiff's Exhibit 9). Sample SB-4 showed a level of benzene concentration of .586 parts per million. (Plaintiff's Exhibit 9). The consequence of a concentration being found to exceed the IDNR's action level for any given contaminant is that some additional investigation is required for the site which the sample was taken from. The threshold standard of .54 reflects a level at which there is the potential for soil contamination to leach into usable ground water. The spill site on the plaintiff's property contained fractured bedrock beneath the soil. Special rules apply to bedrock sites or "situations where you run into bedrock before water," requiring the immediate bypass of a Tier I investigation in favor of a Tier II assessment. In this case, because the spill site contained sandy soil with fractured bedrock approximately seven feet below, the benzene posed a threat to the bedrock aquifer as it could potentially leach, seep, or move vertically and contaminate the ground water. The ground water is approximately 27 feet below the surface. The potential threat from the benzene could be expected to last anywhere from weeks to a few months after the spill.

Also on April 27, 2001, GAB sent a letter to Mr. Grenard requesting documentation in relation to his business loss claim as estimated in Mr. Grenard's April 6, 2001 letter (Defendants' Exhibit C). In a May 1, 2001 letter from Mr. Marek to the plaintiff, Apex informed the plaintiff:

> Based on these screening results, the surface spill has caused environmental impact to the subsurface soils where the need for prompt implementation of corrective measures to prevent potential vertical distribution of contamination. Removal of the contamination from the soils will help prevent potential for groundwater impact, assuming it has not already occurred. The need for prompt attention is due to the fact that the site was void of pre-existing contamination and since this site has a sensitive receptor, which is a bedrock aquifer.

(Plaintiff's Exhibit 8). Apex also provided the plaintiff with a non-binding preliminary cost estimate range for recommended corrective measures ranging from $59,350.00 to $77,100.00.

In a May 14, 2001 letter from Mr. Marek to the plaintiff, Apex informed the plaintiff that "[b]ased on the PID screening results, the properties of the materials samples, and benzene concentrations reported by the lab still exceeding the IDNR Tier I RBCA actions levels, the material should be removed to prevent leaching and/or vertical migration in to the bedrock aquifer" (Plaintiff's Exhibit 9). On May 23, 2001, Apex provided two alternative remediation estimates, one in the amount of $124,420.00 and the other in the amount of $91,731.00 (Plaintiff's Exhibit 10). These estimates were forwarded to Mr. Phelps and GAB by Mr. Grenard on June 1, 2001 (Plaintiff's Exhibit 11). Mr. Phelps asked his co-worker, Ron Kohler, for assistance in managing the plaintiff's business interruption claim. Mr. Kohler questioned the plaintiff's initial remediation estimates because he was not certain that the damage from the spill was substantial enough to necessitate a "major clean-up." Mr. Kohler was unaware of any correspondence between GAB and the plaintiff or its counsel addressing the spill between the beginning of Mr. Phelps' involvement in handling the spill through September 6, 2001. Mr. Kohler was aware that the plaintiff planned to file a lawsuit if the defendants would not take responsibility for remediation of the spill site. Mr. Kohler never requested that Mr. Marek, or anyone else, perform additional testing at the spill site. At trial, Mr. Kohler testified that Mr. Grenard made an oral demand for $124,000.00, but admitted that there was no documentation evidencing the demand.[2]

At some point after Mr. Kohler initially became involved with the spill, he turned over his involvement to Neil Searcy. Mr. Searcy, like Mr. Kohler, wanted to re-sample the spill site, obtain a second opinion as to the level of contamination, and look for

[2] The court finds that although there may have been communication concerning the initial remediation estimate of $124,000, there was no "demand" made for it.

alternative remedies that were both less obtrusive and expensive than digging. Mr. Searcy described Mr. Marek's remediation proposals as using an "elephant gun to kill a mosquito." According to Mr. Searcy, after Mr. Marek's initial investigation, reports, and recommendations, there was no further investigation, testing, or any other work done concerning the spill site at GAB's request through September, 2001. Mr. Searcy knew that the plaintiff's position was that GAB had a duty to hire someone for remediation of the spill site.

On June 19, 2001, Mr. Grenard faxed to GAB an inventory reconciliation stating that 47.8 gallons of fuel was lost on March 16, 2001 (Defendants' Exhibit D). The defendants were notified of the plaintiff's intent to file a citizens suit arising out of the spill on July 9, 2001. On July 11, 2001, Mr. Grenard faxed a letter to GAB concerning a loss analysis completed by the plaintiff's accountant, as well as attorney's fees incurred by the plaintiff (Plaintiff's Exhibit 13). The letter further stated that litigation may be the only alternative if settlement proved unsuccessful. On July 16, 2001, the plaintiff sent a Business Interruption Loss Calculation to GAB. In response, GAB sent a letter to Mr. Grenard requesting more information relating to the estimated business interruption loss (Defendants' Exhibit C). Also on July 16, 2001, Mr. Grenard sent a letter to Mr. Searcy memorializing their conversation of the same day (Plaintiff's Exhibit 14). The letter included in relevant part:

> [Defendant Maquoketa Valley] would not undertake to remediate at its cost the contamination caused by its negligent driver . . .

At trial, Mr. Searcy testified that the information contained in Mr. Grenard's July 16, 2001 letter was inaccurate but admitted that he did nothing to clarify or correct Mr. Grenard as to Defendant Maquoketa Valley's position.

In a letter dated July 31, 2001, the IDNR ordered the plaintiff to take various actions related to the spill, including retention of a groundwater professional and submission of a Tier I Report (Plaintiff's Exhibit 15). In an August 3, 2001 letter from

the plaintiff to Apex, the plaintiff indicated that it believed the required testing had already been completed by Apex (Plaintiff's Exhibit 16). A copy of this letter was sent to the IDNR. The IDNR wrote a letter to the plaintiff on August 7, 2001, indicating that it must complete the actions requested in the July 31, 2001 letter (Plaintiff's Exhibit 17). In a letter dated August 14, 2001, Mr. Grenard informed the IDNR that Defendant Maquoketa Valley was the party responsible for the spill and that notice had been served regarding the prospect of a federal lawsuit pursuant to RCRA (Plaintiff's Exhibit 18). On August 21, 2001, Mr. Grenard informed GAB that the IDNR was demanding that the plaintiff complete additional testing, and that the plaintiff planned to file a federal lawsuit in two weeks time (Plaintiff's Exhibit 19).

Counsel for Defendant Maquoketa Valley indicated to Mr. Grenard in a letter dated September 16, 2001, that a Site Access License was received and forwarded to Defendant Maquoketa Valley (Defendants' Exhibit H). In the letter, counsel for Defendant Maquoketa Valley indicated that the lawsuit seemed premature. On September 17, 2001, the plaintiff filed the Complaint in this case (docket number 1). In a September 20, 2001 letter David Wornson of the IDNR indicated to Defendant Maquoketa Valley that "it is clear that Maquoketa Valley REC caused the spill/release and is 'a person having control over a hazardous substance' and [is] responsible for taking corrective action under Iowa Code sections 455 B.381 et seq.," and that the IDNR had decided that "it is most equitable to require the party who caused the spill/release to perform the required tiered site assessment." (Plaintiff's Exhibit 23). The IDNR, through Sandra Echternacht, also notified Defendant Maquoketa Valley, by letter dated September 20, 2001, that it would be required to take certain action in respect to the spill including notifying the IDNR within 30 days of a ground water professional who could perform testing at the spill site(Plaintiff's Exhibit 22).[3] A copy of this letter was sent to GAB.

[3] The defendants then failed to notify the IDNR of their ground water professional (continued…)

Counsel for the defendant, Larry Mr. McLellan, contacted Morris Preston of Preston Engineering in October of 2001, to discuss performing a Tier I investigation at the spill site.[4] After receiving information that the spill site was found to possibly contain fractured bedrock, "it was elected to proceed with a full Tier II investigation report." Mr. Preston asked the IDNR if the remediation could be halted after Preston Engineering had the opportunity to obtain samples so that courses of action, other than those previously proposed by Mr. Marek, could be identified and possibly pursued. Mr. Preston felt that Mr. Marek's remediation proposals envisioned "a fairly expensive undertaking" in light of the fact that only one soil sample had exceeded Tier I contamination criteria, and that the sample found to exceed IDNR action levels could have been erroneous. On October 12, 2001 Mr. McLellan wrote a letter to David Wornson of the IDNR which contained, in relevant part, the following:

> . . . contrary to Mr. McNamara's claims, our investigation indicates that [the defendants were] not responsible for the release that occurred on March 16, 2001. . . . Nevertheless, my client is willing to perform a Tier I Report provided that it does not constitute any admission of liability for the release and an acceptable access agreement can be negotiated with McNamara Holdings L.C. . . .

(Plaintiff's Exhibit 25). On November 7, 2001, the IDNR was informed that Defendant Maquoketa Valley had retained Mr. Morris Preston to conduct an investigation of the spill site.

The plaintiff filed a motion for a preliminary injunction on December 10, 2001 (docket number 4). The defendants filed a resistance to the plaintiff's motion on December 22, 2001 (docket number 6). On January 21, 2002, an access agreement was signed by

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[3](…continued)
until November 7, 2001 (Defendants' Exhibit K).

[4] Mr. Preston was initially retained by counsel for the defendants as an expert "to assist [the defendants] in defending this matter" (Plaintiff's Exhibit 56).

the plaintiff and Defendant Maquoketa Valley. In a letter dated January 21, 2002, Defendant Maquoketa Valley informed the plaintiff that its groundwater professional, Preston Engineering, was available to perform an investigation of the spill site on January 28 or 29, 2002 (Plaintiff's Exhibit 26). Sometime shortly thereafter, Preston Engineering brought drilling equipment onto the plaintiff's property to perform its investigation. Preston Engineering set up monitoring wells in a triangular shape on the plaintiff's property according to the areas of concern identified by the IDNR. Seven samples were analyzed and no samples were found to exceed the IDNR action levels (Plaintiff's Exhibit 27). At the request of Mr. McNamara, Preston Engineering performed additional testing of the sample site SB-4 the day after they began their testing.[5] Preston Engineering did not perform any testing to the southwest of the spill site because it presumed that the groundwater beneath the site flowed in a north-easterly direction rather than to the southwest.[6] During its Tier II investigation, one or more of Preston Engineering's employees noticed a faint smell of gasoline when drilling one or more of the holes for sampling. Mr. Preston never inspected the spill site after Preston Engineering finished testing to determine whether any damage had been caused by the equipment. Preston Engineering's equipment and drilling caused some damage to the plaintiff's concrete. See Defendant's Exhibits CC to UU. The unresisted hearsay evidence was that it would cost $7,000 to replace the concrete damaged by the drilling. This seems quite high given the nature of the damage done but there is no principled way to say that the damage can be remedied with less than that requested.

On March 14, 2002, Preston Engineering submitted a Tier II Report to the IDNR and requested a classification of "no action required" (Plaintiff's Exhibit 58). In an

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[5] Sample site SB-4 was the sample which indicated that contamination existed on the spill site during Mr. Marek's testing on April 27, 2001.

[6] It was later discovered that the underground water actually flowed in a south-westerly direction.

April 26, 2002 letter from the IDNR to Defendant Maquoketa Valley, the IDNR requested that revisions be made to the Tier II report, including changing the designation of the responsible party from the plaintiff to the defendants because "[i]t is the department's position that Maquoketa Valley Rural Electric Coop is the [responsible party]" (Plaintiff's Exhibit 28). In a letter to the IDNR dated August 1, 2002, Defendant Maquoketa Valley acknowledged that it consented to conducting a Tier II assessment, but refused to designate itself as the responsible party (Plaintiff's Exhibit 29). On August 21, 2002, Preston Engineering sent revisions of the Tier II Report to the IDNR as requested by the IDNR (Plaintiff's Exhibit 30).

In a September 12, 2002 letter from Apex to the plaintiff, Apex recommended testing of the groundwater from monitoring wells because the "groundwater could be affected if the soil contamination detected in April 2001 leached vertically" (Plaintiff's Exhibit 32). The IDNR wrote a letter to Defendant Maquoketa Valley on September 18, 2002, in which the IDNR requested revisions to the already revised Tier II Report, asked that the plaintiff's name be removed from the responsible party category, requested that Defendant Maquoketa Valley sign the Report, and indicated that Defendant Maquoketa Valley could, if it so wished, include a statement that it refused to admit that it was the "responsible party" (Plaintiff's Exhibit 32). Mr. McLellan wrote a letter to the IDNR on November 4, 2002, stating that Maquoketa Valley had performed the revisions requested by the IDNR, and that while the defendants were "submitting the [Tier II] report to the [IDNR]. . . . Neither undertaking the Tier II Assessment and Report nor submitting this report to the IDNR is an admission of sole responsibility by Maquoketa Valley REC for the alleged contamination that was allegedly found on the site" (Defendants' Exhibit Z). On February 17, 2003, the IDNR issued a "No Further Action" letter to Defendant Maquoketa Valley (Plaintiff's Exhibit 34). Included in the letter was the following directive:

> MONITORING WELLS AT THIS SITE SHOULD BE SECURED AND MAINTAINED UNTIL THEY ARE

> PROPERLY PLUGGED AND ABANDONED. WELL ABANDONMENT AND PLUGGING OF MONITORING WELLS SHOULD BE PERFORMED IN ACCORDANCE WITH IAC CHAPTER 567-39.

As of the date of trial, the monitoring wells that were installed by the defendants had not been removed or abandoned.[7]

Conclusions of Law

RCRA Claims

The plaintiff first alleges that the defendants violated § 6972(a)(1)(B) of RCRA which states in relevant part:

> . . . any person may commence a civil action on his own behalf . . . (B) against any person . . . including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . .

The elements of a prima facie case under § 6972(a)(1)(B) are:

> (1) conditions which present or may present an imminent and substantial endangerment; (2) the endangerment stems from the handling, storage, treatment, transportation, or disposal of a solid or hazardous waste; and (3) [the] defendants have contributed to or are contributing to such handling, storage, treatment, transportation, or disposal.

United States v. Aceto Agr. Chemicals Corp., 872 F.2d 1373, 1382 (8th Cir. 1989) (citing United States v. Bliss, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987). In order for a threat to be considered "imminent," it must pose an imminent risk at the time of the filing of a

[7] The defendants stipulate that the monitoring wells on the plaintiff's property will be plugged in accordance with Iowa law and further agree to pay for the cost of abandoning these wells.

citizen's suit and a claim must fail if it asserts only that the alleged contaminated site posed an endangerment at some time in the past. Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996). A finding of "imminency" does not require a showing that actual harm will occur immediately so long as the risk of threatened or potential harm or endangerment is present. Price v. United States Navy, 39 F.3d 1011, 1019 (9th Cir. 1994) (citing United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1394 (D.N.H. 1985); United States v. Vertac Chemical Corp., 489 F. Supp. 870, 885 (E.D. Ark. 1980)). "'An imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public." Price, supra, at 1019 (citing Environmental Defense Fund, Inc. v. Environmental Protection Agency, 465 F.2d 528, 535 (D.C. Cir. 1972)).

The plaintiff alleges that the defendants created a situation that may have presented an "imminent and substantial endangerment to health or the environment" by (1) causing the release of petroleum, a solid or hazardous waste; (2) by subsequently failing to investigate the possible effects of spilled petroleum on the plaintiff's property, including the soil, bedrock, and water beneath it; and (3) by failing to remediate the spill and any causal effects of the spill. As evidence for its contention that the petroleum spill may have created an imminent and substantial endangerment, the plaintiff points to the investigation and findings of Mr. Marek and Apex Environmental Incorporation. Specifically, the plaintiff asserts that the sample from the spill site which exceeded the IDNR's action level for benzene contamination (sample SB-4) coupled with the fact that the site was a fractured bedrock site with ground water streaming beneath or near the bedrock, demonstrates that there may have been an imminent and substantial endangerment to health or the environment beginning sometime shortly after the spill and lasting at least until September 17, 2001, the date on which the plaintiff filed suit.

The defendants argue that there was no imminent or substantial endangerment to health or the environment caused by the petroleum spill. Specifically, the defendants argue that the petroleum release was a "de minimus" release and that it was thus merely

"speculative that the small amount of gasoline [was] ever going to get to that ground water situation." In support of its contention that there was no imminent or substantial endangerment to health or environment caused by the spill at the time that the plaintiff filed suit, the defendants argue that (1) the exceedence of the IDNR's action level for benzene contamination was only slight, was found in only one sample, and could have been a mistake; (2) that Mr. Marek was unqualified to conduct his investigation and produce the remediation proposals that he prepared; (3) that Mr. Marek's remediation proposals were highly unreasonable as to both the proposed steps for remediation and their cost in comparison to the de minimus spill; and (4) that Preston Engineering found no contamination when they conducted a Tier II assessment of the site early in 2002. The defendants further assert that they did not refuse to participate in the investigation or remediation of the spill site but rather simply wanted a reasonable assessment of the contamination level at the site, the proposed investigatory and remediation steps, and the costs related to any action to be taken at the spill site.

The court finds that the plaintiff has proven its prima facie case under § 6972(a)(1)(B). The defendants clearly are responsible for the release of approximately 47 gallons of petroleum on the plaintiff's property on March 16, 2001. That spill, together with the fact that the site included fractured bedrock aquifer created the potential for vertical distribution of contamination by way of its leaching, seeping, or otherwise moving toward the groundwater supply. Therefore, the situation created "may" have presented "an imminent and substantial endangerment" to the environment and the public health had the contamination in fact reached the ground water. The potential endangerment stemmed from the "disposal" or mishandling of the petroleum caused by the defendants. Finally, the defendants "contributed to" the disposal of the petroleum by the failure of Defendant Gehl to have his vehicle under control, and defendants continued to contribute to the disposal of the petroleum by failing to take prompt investigatory or remedial action when it was clear that the defendants had caused the spill.

The plaintiff next alleges that the defendants violated § 6972(a)(1)(A) of RCRA. That provision states in relevant part:

> . . . any person may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter . . .

42 U.S.C. § 6972(a)(1)(A). The plaintiff alleges that the defendants violated § 6972(a)(1)(A) because the defendants "disposed of petroleum on [the plaintiff's] property and didn't do so according to law." The defendants argue that the plaintiff should not be allowed to recover under § 6872(a)(1)(A) because it failed to plead the provision in its complaint and subsequently failed to request amendment of the complaint. The plaintiff answers that the defendants received adequate notice of its allegation under § 6972(a)(1)(A) because the provision was included both in its motion for summary judgment (docket number 24) and in its trial brief (docket number 48). The court finds that because the plaintiff did not properly plead for relief under § 6972(a)(1)(A), the plaintiff may not recover pursuant to that provision. "A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim[s] asserted in the pleadings." Sylvan Beach, Inc. v. Koch et al., 140 F.2d 852, 861 (8th Cir. 1944) (citing Standard Oil Co. v. State of Missouri, 224 U.S. 270, 281 (1912)). Unless all interested parties are in court and have voluntarily litigated an issue not within the pleadings, the court shall consider only the issues made by the pleadings, and the judgment of the court may not extend beyond those issues nor beyond the scope of the relief originally demanded. Sylvan Beach, supra, at 861. The defendants did not answer as to the plaintiff's claims under § 6972(a)(1)(A) as presented initially in the plaintiff's motion for summary judgment and again in the plaintiff's trial brief. Further, the defendants voiced concerns in response to the plaintiff's mention of recovery under § 6972(a)(1)(A) in closing arguments at trial, indicating that it would be prejudiced if the court were to allow the plaintiff to proceed as to such recovery. Accordingly, it cannot be said in the present case that the defendants

"voluntarily litigated" issues under § 6972(a)(1)(A). See Sylvan Beach, supra, at 861 (citing Standard Oil Co., supra, at 281). Additionally, Fed. R. Civ. P. 16(e) states, in relevant part, the following:

> Pretrial Orders. . . . This order shall control the subsequent course of the action unless modified by a subsequent order.

The plaintiff did not include a claim under § 6972(a)(1)(A) either outright or by way of description within its list of legal issues in the final pretrial order in this case. The court finds, therefore, that the plaintiff's claim pursuant to § 6972(a)(1)(A) was not properly before the court at the time of trial.

State Statutory and Common Law Claims

The plaintiff has additionally alleges that (1) the defendants violated Iowa Code § 455B.111; (2) the defendants created a nuisance according to Iowa common law; and (3) the defendants committed negligence under Iowa common law. The court will not address any of these claims as any recovery made pursuant to such claims would entitle the plaintiff to less than or duplicate the recovery to be received pursuant to the plaintiff's RCRA claims.

Attorney's Fees

The plaintiff has made a claim for attorney's fees pursuant to 42 U.S.C. § 6972(e), which provides in relevant part:

> The court, in issuing any final order in any action brought pursuant to this section . . . may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.

42 U.S.C. § 6972(e). A prevailing plaintiff "should ordinarily recover attorney's fees unless special circumstances would render such an award unjust." See Williams v. Miller, 620 F. 2d 199, 202 (8th Cir. 1980). The burden of proving special circumstances is upon the losing defendant. Williams, supra, at 202 (citing Mid-Hudson Legal Services, Inc. v. G & U, Inc., 578 F.2d 34, 38 (2d Cir. 1978)). The court must therefore determine

whether the plaintiff, as the prevailing party in this action, is entitled to reasonable attorney's fees and costs. The defendants argue that the plaintiff should not be awarded attorney's fees because it has attempted to overreach prior to and throughout the course of the instant litigation. As evidence for its contention, the defendants point out that the plaintiff's initial claims for business loss turned out to be highly disproportionate to its actual business loss, and that the plaintiff's remediation proposals were grossly excessive in the cost and performance called for in proportion to the "de minimus" petroleum spill. The court finds that the defendants have failed to demonstrate that special circumstances here exist which would completely preclude an award of attorney's fees to the plaintiff. See Williams, supra, at 202. The plaintiff is a "prevailing party" having been awarded judgment on the merits and the court therefore finds that the plaintiff is entitled to reasonable[8] attorney's fees and costs.

Upon the foregoing,

IT IS ORDERED that the court finds in favor of the plaintiff McNamara Holdings, L.C. and against Defendants Maquoketa Valley Rural Electrical Cooperative and Jeff Gehl as to the plaintiff's claim pursuant to 42 U.S.C. §§ 6972(a)(1)(B) in the amount of $7,242.00 together with reasonable attorney's fees and costs in an amount to be determined. The defendants shall properly plug any monitoring wells left on the plaintiff's property in accordance with Iowa law, and pay for any cost incurred in abandoning the wells. The court will retain jurisdiction over this matter to enforce these obligations. The Clerk of Court shall enter judgment accordingly.

September 30, 2004.

JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT

[8]The fees can be awarded pursuant to a claim asserted under our Local Rule 54.2. They must bear a reasonable relationship to the remedies obtained herein.